Supreme Court, U.S.
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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

ELLIS E. NEDER, JR., PETITIONER,

v.

UNITED STATES, RESPONDENT.

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

NOEL G. LAWRENCE
*Law Offices of*
*Noel G. Lawrence, P.A.*
*100 Riverside Avenue*
*Jacksonville, Florida 32202*
*(904) 733-1237*

JAVIER H. RUBINSTEIN
*Counsel of Record*
GARY S. FEINERMAN
ROBERT M. DOW, JR.
KASPAR J. STOFFELMAYR
*Mayer, Brown & Platt*
*190 South LaSalle Street*
*Chicago, Illinois 60603*
*(312) 782-0600*

*Counsel for Petitioner*

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## QUESTIONS PRESENTED

Petitioner was convicted of mail, wire, bank and tax fraud in violation of 18 U.S.C. §§ 1341, 1343, 1344, and 26 U.S.C. § 7206(1). The trial court, over defense counsel's timely objection, instructed the jury that it "need not consider" whether petitioner's allegedly fraudulent representations and omissions were material because materiality "is not a question for the jury to decide." Instead of submitting the materiality question to the jury, the trial court entered its own judicial finding that the alleged representations and omissions were material. On appeal, the Eleventh Circuit held that, as to the tax fraud counts, the district court's removal of materiality from the jury's consideration was constitutional error under *United States v. Gaudin*, 515 U.S. 506 (1995). However, the court concluded that the error was "harmless" because "materiality was not in dispute with respect to Neder's tax fraud offense." As to the mail, wire and bank fraud counts, the Eleventh Circuit held that the district court's removal of materiality from the jury's consideration was not erroneous under *Gaudin* since materiality is not an element of any of those statutory offenses.

The questions presented are:

1. Whether the complete removal of an essential element of a charged offense from the jury's consideration is subject to harmless-error review.

2. Whether materiality is an element of the crimes set forth in the federal mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343) and bank fraud (18 U.S.C. § 1344) statutes.

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**Petition For A Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eleventh Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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Ellis E. Neder, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-13a) is reported at 136 F.3d 1459. The judgment of the district court (App., *infra*, 14a-22a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on March 19, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2 of the United States Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law." The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." 18 U.S.C. §§ 1341, 1343, 1344, and 26 U.S.C. § 7206(1) are reproduced at App., *infra*, 43a-47a.

## STATEMENT

This case presents the important and recurring constitutional question that this Court left open in *United States* v. *Gaudin*, 515 U.S. 506 (1995); *Johnson* v. *United States*, 117 S. Ct. 1544 (1997), and, most recently, in *Rogers* v. *United States*, 118 S. Ct. 673 (1998)—namely, whether the trial court's removal of an element of a charged offense is subject to harmless-error review under *Chapman* v. *California*, 386 U.S. 18 (1967), notwithstanding the defendant's constitutional right to a jury determination of guilt or innocence as to each element of the offense. This case also presents the separate and far-reaching question of whether materiality is an element of the federal mail, wire and bank fraud statutes. On each of these important questions, the courts of appeals are deeply divided and in need of Supreme Court review.

A. In *Rogers* v. *United States*, 118 S. Ct. 673 (1998), this Court granted certiorari to decide whether the omission of



an element of a charged offense from the jury instructions is subject to harmless-error review. After argument, the Court dismissed the petition as improvidently granted on the ground that the question was "not fairly presented by the record." *Id.* at 645. Earlier, in *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997), this Court noted that the answer to the question of whether a *Gaudin* error (the error that occurred here) is subject to harmless-error review is "by no means clear." The Court concluded, however, that it "need not decide that question" because the defendant in *Johnson* (unlike petitioner here) did not timely object to the error at trial.

This case provides the ideal opportunity for the Court "to address [the] important issue of constitutional law" left open in *Rogers*, *Johnson* and *Gaudin*. *Rogers*, 118 S. Ct. at 677 (O'Connor, J., concurring). See also *id.* at 675 (plurality opinion) (same); *Gaudin*, 515 U.S. at 526-27 (Rehnquist, C.J., concurring) (noting that the Court left open the question whether a *Gaudin* error is subject to harmless-error review). As the Eleventh Circuit noted below (App., *infra*, 11a n.10), the courts of appeals are deeply split over whether a *Gaudin* error is subject to harmless-error review. The Second, Eighth and Eleventh Circuits have held that *Gaudin* errors are subject to harmless-error review. See *infra* at 10 n.4 & cases cited therein. The First, Fourth, Fifth, Seventh, Ninth and D.C. Circuits, on the other hand, have held that *Gaudin* errors are immune from harmless-error scrutiny. See *infra* at 10 n.5 & cases cited therein.

This conflict vividly reflects the larger controversy over whether elemental omissions like a *Gaudin* error can ever constitutionally be "harmless." As the Eleventh Circuit explained in *Rogers* v. *United States*, 94 F.3d 1519, 1524 n.11 (1996), cert. dismissed, 118 S. Ct. 643 (1998), "[s]ome circuits have determined that an instructional omission mandates reversal regardless of the circumstances." (Citations omitted).

In contrast, "[o]ther circuits have recognized that this type of mistake will sometimes be amenable to harmless error scrutiny." *Ibid.* (citations omitted). Accordingly, the Seventh, Ninth and Eleventh Circuits each have openly invited Supreme Court review of this issue, and acknowledged "that further guidance and clarification would be extremely helpful." *Ibid.* (citing *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 n.2 (9th Cir. 1991); *Teel* v. *Tennessee*, 498 U.S. 1007 (1990) (White, J., dissenting from denial of certiorari)).[1] This Court should grant the petition to resolve the conflict on this important and unanswered question of constitutional law.

B. This case also presents the unanswered and widely recurring question of whether materiality is an element of the federal mail, wire and bank fraud statutes, each of which proscribes a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343, 1344. The court of appeals, citing this Court's decision in *United States* v. *Wells*, 117 S. Ct. 921 (1997), held that none of these statutes contain a materiality requirement since none "contain the word 'material.'" App., *infra*, 7a. With this holding, the Eleventh Circuit has deepened the circuit split over this question. The First and Fifth Circuits, for instance, like the Eleventh Circuit, have held that materiality is not an element of

[1] Accord, *e.g.*, *United States* v. *Parmelee*, 42 F.3d 387, 392 & n.7 (7th Cir. 1994) ("the Supreme Court has yet to decide the question whether instructional error of this sort can ever be harmless. * * * [A] conflict of authority exists concerning the availability of harmless-error analysis in this situation. * * * The depth of this conflict underscores the importance of the question. Both considerations counsel for a grant of certiorari"), cert. denied, 116 S. Ct. 63 (1995); J. Greabe, *Spelling Guilt Out Of A Record? Harmless-Error Review Of Mandatory Presumptions And Elemental Misdescriptions*, 74 B.U. L. REV. 819, 844 (1994) (noting that the current state of the law "has fostered predictable confusion in the lower courts").



the wire, mail or bank fraud statutes. See *infra* at 21 n. 10 & cases cited therein. In contrast, the Second, Fourth, Sixth, Ninth and D.C. Circuits have held that materiality is an element of these statutes. See *infra* at 22 n. 11 & cases cited therein.

Adding further to the confusion, the Seventh, Eighth and Tenth Circuits have staked out an indeterminate middle ground. The Eighth and Tenth Circuits have held that "[a]lthough materiality is not an independent element of a wire fraud prosecution, 'there is a materiality *aspect* to the determination whether the acts of an accused give rise to a scheme to defraud' that 'is appropriately submitted to the jury as one component of the larger factual question as to the existence of fraud and a scheme to defraud.'" *United States* v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir. 1997) (emphasis added) (citation omitted). See also *United States* v. *Slaughter*, 128 F.3d 623, 629 (8th Cir. 1997) (adopting the Tenth Circuit's approach). The Seventh Circuit, in contrast, has held that while Congress did not "want to classify immaterial lies as frauds for purposes of the mail- and wire-fraud statutes," a jury need not be separately instructed on materiality because "the term 'fraud' embodies the concept of materiality," and thus "[a]n instruction in the language of the statute adequately puts the issue before the jury." *United States* v. *Coffman*, 94 F.3d 330 (7th Cir. 1996), cert. denied, 117 S. Ct. 1426 (1997).

In short, the courts of appeals are irreconcilably split over whether materiality is an element of the mail, wire and bank fraud statutes. Such uncertainty over the elements of criminal statutes is intolerable. This Court should grant the petition to resolve this important and recurring question.

C. Petitioner was charged with multiple counts of federal tax, mail, wire and bank fraud in connection with a series of land acquisition and development transactions. The indictment alleged, among other things, that petitioner

concealed from his lenders certain material facts concerning the source of certain deposit funds and the structure of those transactions, and also that he failed to report certain profits from these transactions in his 1985 and 1986 income tax returns. At trial, "the district court instructed the jury that if it found beyond a reasonable doubt that the alleged statements, representations, or promises were false, it need not consider whether they were material because materiality was not an issue for the jury to decide. The court entered its own findings regarding materiality outside the presence of the jury. Petitioner timely objected to the court's findings and its failure to submit the issue of materiality to the jury." App., *infra*, 3a. See also App., *infra*, 28a, 30a, 34a (excerpts of jury instructions). On direct appeal, the Eleventh Circuit affirmed petitioner's convictions on all counts.

***Harmless-Error.*** As to petitioner's tax fraud conviction under 18 U.S.C. § 7206(1), the Eleventh Circuit acknowledged that under *United States* v. *Gaudin*, 515 U.S. 506 (1995), the district court "erred in not submitting the element of materiality to the jury." App., *infra*, 11a. The court nevertheless held that "*Gaudin* errors do not require automatic reversal but are subject to harmless error analysis," citing decisions from the Second, Seventh, Eighth and Ninth Circuits.[2] The court recognized that its harmless-error holding conflicted with decisions of the First, Fourth, Fifth, Sixth and D.C. Circuits.[3] The Eleventh Circuit

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[2] App., *infra*, 11a n.10 (citing *Bilzerian* v. *United States*, 127 F.3d 237, 242 (2d Cir.1997); *United States* v. *Knapp*, 120 F.3d 928, 932 (9th Cir.), cert. denied, 118 S. Ct. 417 (1997); *Waldemer* v. *United States*, 106 F.3d 729, 732 (7th Cir.1996); *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir.1996)).

[3] App., *infra*, 11a n.10 (citing *United States* v. *DeFries*, 129 F.3d 1293, 1311-12 & n.13 (D.C. Cir.1997); *United States* v. *David*, 83 F.3d 638, 647 (4th Cir. 1996); *United States* v. *DiRico*, 78 F.3d 732, 737-38 (1st Cir.1996); *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir.1996)).



then proceeded to hold that the trial court's *Gaudin* error was harmless "[b]ecause materiality was not in dispute with respect to Neder's tax fraud offense, [and thus] the district court's *Gaudin* error 'did not contribute to the verdict obtained.'" App., *infra*, 13a (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991); *Chapman* v. *California*, 386 U.S. 18, 24 (1967)).

***Materiality.*** The Eleventh Circuit affirmed petitioner's mail, wire and bank fraud convictions, but on different grounds. Citing *United States* v. *Wells*, 117 S. Ct. 921 (1997), the court of appeals held that the trial court's directed finding of materiality did not violate petitioner's rights under *Gaudin* because materiality is not an element of those offenses. The court held that materiality is not an element of the mail and wire fraud statutes (§§ 1341 & 1343) because they "do not contain the word 'material.' Further, § 1341 was enacted as part of the recodification of the federal criminal code in 1948, and § 1343 was patterned after § 1341. Based on these factors considered in *Wells*, we conclude that materiality is not an element of fraud offenses in §§ 1341 and 1343." App., *infra*, 7a. The court reached the same conclusion as to the bank fraud statute (§ 1344), because "its language, like § 1343, was patterned after § 1341." *Id.* at 9a.

The Eleventh Circuit acknowledged that unlike the statute in *Wells* (18 U.S.C. § 1014), which prohibits "false statements," §§ 1341, 1343 and 1344 punish a "scheme or artifice" either "to defraud" or to "obtain[]" money or property "by means of false or fraudulent pretenses, representations, or promises." However, rejecting the Ninth Circuit's contrary holding in *United States* v. *Nash*, 115 F.3d 1431, 1436 (1997), cert. denied, 118 S. Ct. 1054 (1998), the court held that the

textual differences between § 1014 and §§ 1341, 1343 and 1344 were irrelevant under *Wells*:

> We disagree with the Ninth Circuit's analysis that since the term "representation" included "some notion of materiality at common law," this indicates that Congress intended for materiality to be an element of the bank fraud statute. * * * This ignores that Congress now has employed the terms "material representation" and "material misrepresentation" in other statutes. The fact that Congress uses the term "material" in conjunction with "representation" or "misrepresentation" in some statutes but not in others rebuts any presumption that Congress now intends to make materiality an element under a statute whenever it employs the term "representation" in that statute.

App., *infra*, 9a. The court rejected as "unpersuasive" the Tenth Circuit's holding in *United States* v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir.1997), that "there is a materiality aspect to the determination whether the acts of an accused give rise to a scheme to defraud." App., *infra*, 7a n.4. The court also refused to adopt "the Ninth Circuit's rationale [in *Nash*] that § 1344 targets fraud and, therefore, necessarily includes materiality as an element of bank fraud. This approach is inconsistent with *Wells*, which disfavors inferring a materiality requirement where the statutory language does not expressly include one." *Id.* at 10a. Having concluded that materiality is not an element of §§ 1341, 1343 and 1344, the court of appeals held that the omission of materiality as to those offenses did not violate *Gaudin*, and thus affirmed petitioner's mail, wire and bank fraud convictions.



## REASONS FOR GRANTING THE PETITION

### I. THE COURT OF APPEALS' HOLDING THAT *GAUDIN* ERRORS ARE SUBJECT TO HARMLESS-ERROR REVIEW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND STATE COURTS OF LAST RESORT.

The court of appeals' decision in this case raises the fundamental question of whether a trial court's removal of an element of a criminal offense from the jury's consideration is subject to harmless-error review where the jury made no findings concerning the omitted element. This Court granted certiorari to decide that question in *Rogers* v. *United States*, 118 S. Ct. 673 (1998), but ultimately determined that the question was "not fairly presented by the record." *Id.* at 645. Similarly, in *Johnson* v. *United States*, 117 S. Ct. 1544, 1550 (1997), this Court noted that the answer to the question presented here was "not at all clear," but concluded that it "need not decide that question" because there was no timely objection to the erroneous instruction, and the case thus was governed by entirely different plain error standards. And in *United States* v. *Gaudin*, 515 U.S. 506 (1995), where this Court held that materiality was a question for the jury, not the court, this Court left open the question of whether a *Gaudin* error is subject to harmless-error review. See *Gaudin*, 515 U.S. at 526-27 (Rehnquist, C.J., concurring).

The question of whether an elemental omission is subject to harmless-error review is vitally significant. The need for Supreme Court review of this issue also is immediate and compelling, since the federal and state courts have deeply split over the answer, and have openly called for Supreme Court guidance. This case provides an ideal opportunity to put this controversy to rest.

### A. The Courts of Appeals Are Deadlocked As To Whether *Gaudin* Errors Are Subject To Harmless-Error Review.

As the Eleventh Circuit acknowledged (App., *infra*, 11a-12a & n.10), the circuits are deeply divided over whether a *Gaudin* error (*i.e.*, where materiality is decided by the court and removed from the jury's consideration) is subject to harmless-error review where, as here, defense counsel asserts a timely objection to the constitutional error.

The Eleventh Circuit's holding that *Gaudin* errors are subject to harmless-error review follows similar rulings by the Second and Eighth Circuits.[4] These decisions irreconcilably conflict, however, with decisions of the First, Fourth, Fifth, Seventh, Ninth and District of Columbia Circuits which have held that *Gaudin* errors are immune from harmless-error review so long as the jury does not make findings concerning materiality through its consideration of other elements.[5]

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[4] See, *e.g.*, *Bilzerian* v. *United States*, 127 F.3d 237, 242 (2d Cir. 1997) (holding that "failure to include materiality * * * was harmless here because the evidence overwhelmingly demonstrated that Bilzerian would have been convicted even if the jury had been given the issue of materiality"); *United States* v. *Raether*, 82 F.3d 192, 194 (8th Cir. 1996) ("We conclude *Gaudin* errors are subject to harmless error review"). See also *United States* v. *Fern*, 117 F.3d 1298, 1306 (11th Cir. 1997) ("a *Gaudin* error does not fall within that limited class of errors known as 'structural errors,' *e.g.*, errors 'affecting the framework within which the trial proceeds, rather than simply an error in the trial itself.' To the contrary, a *Gaudin* error is more correctly viewed as analogous to improperly instructing the jury on an element of the offense, an error which is subject to harmless error review") (quoting *Johnson*, 117 S. Ct. at 1: 50).

[5] See, *e.g.*, *United States* v. *DiRico*, 78 F.3d 732, 737-38 (1st Cir. 1996) ("where a jury has not rendered a verdict that addresses every essential element of the charged offense, and therefore has not rendered a verdict on the crime charged, the question of whether the same verdict would have been rendered absent the constitutional error is meaningless. Here, because the jury did not determine whether the government had proven, beyond a reasonable doubt, the existence of an essential factual element of the crime of false subscription (*i.e.*, materiality), there was 'no verdict within the meaning of the Sixth Amendment' and harmless error analysis is inapplicable") (quoting *Sullivan*)); *United States* v. *David*, 83 F.3d 638, 647 (4th Cir. 1996) ("failure to instruct on an element of the crime, where that element cannot be inferred from the other elements actually found by the jury, is an error not susceptible to harmless error analysis"); *United States* v. *Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996) ("[t]he reasoning of *Sullivan* leads inescapably to the same conclusion in the present case. Because the element of materiality was withheld from the jury, the jury rendered no verdict as to that particular element of the offense. Thus, the harmless error analysis is similarly inapplicable"); *Waldemer* v. *United States*, 106 F.3d 729, 731 (7th Cir. 1996) ("if an element of an offense is not actually found by a jury, appellate court musings as to the actions of a hypothetical rational jury cannot render such an error harmless").



This circuit split is not surprising, since the federal circuits and state courts have long been divided over whether the omission of an element of the crime charged is subject to harmless-error review. On the one hand, the Second, Eighth and Eleventh Circuits, and the courts of last resort of nine states, have held that elemental omissions are subject to harmless error review.[6] By contrast, the First, Fourth, Fifth,

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[6] See *supra* at 10 & n.4.. See also, *e.g.*, *State* v. *Avila*, 710 P.2d 440 (Ariz. 1985); *State* v. *Watson*, 885 P.2d 1226 (Kan. 1994); *State* v. *Nason*, 433 A.2d 424 (Me. 1981); *People* v. *Vaughn*, 524 N.W.2d 217 (Mich. 1994); *State* v. *Lopez*, 920 P.2d 1017 (N.M. 1996); *State* v. *Gunn*, 437 S.E.2d 75 (S.C. 1993), cert. denied, 510 U.S. 1115 (1994); *State* v. *Barr*, 237 N.W.2d 888 (S.D. 1976); *State* v. *Teel*, 793 S.W.2d 236, cert. denied, 498 U.S. 1007 (1990); *State* v. *Wright*, 581 A.2d 720 (Vt. 1989), cert. denied, 498 U.S. 1032 (1991). See also *State* v. *Correa*, 706 P.2d 1321 (Haw. Ct. App. 1985); *People* v. *Navarette*, 629 N.E.2d 742 (Ill. App. Ct. 1994); *State* v. *Jynes*, 652 So. 2d 91 (La. Ct. App. 1995); *Mouton* v. *State*, 892 S.W.2d 234 (Tex. Ct. App. 1995); *Smoot* v. *Commonwealth*, 445 S.E.2d 688 (Va. Ct. App. 1994).

Sixth, Seventh, Ninth, Tenth and D.C. Circuits[7], and the courts of last resort of eighteen states, have held that the omission of an element from the jury instructions is immune from harmless-error scrutiny.[8]

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[7] See *supra* at 10 & n.5. See also *United States* v. *DeFries*, 129 F.3d 1293, 1311 n.13 (D.C. Cir. 1997) (holding in RICO case that the "district court's failure to allow the jury to decide the enterprise element was, per se, a reversible error") (citing *Gaudin*); *United States* v. *Johnson*, 71 F.3d 139, 144 (4th Cir. 1995) (omission of element precludes harmless error review because such review would require appellate court to "engage in the type of speculation and hypothesizing censured by the Supreme Court in *Sullivan*"); *Hoover* v. *Garfield Heights Mun. Court*, 802 F.2d 168, 178 (6th Cir. 1986) ("the failure to instruct the jury on an essential element of the crime charged is one of the exceptional constitutional errors to which the *Chapman* harmless error analysis does not apply"); *United States* v. *Nguyen*, 73 F.3d 887, 895 (9th Cir. 1995) (where "the jury was precluded from considering whether an essential element existed," and there was no independent jury determination regarding the omitted element, reversal is required); *United States* v. *Laughlin*, 26 F.3d 1523, 1527 (10th Cir.) ("[f]ailure to instruct on such an essential element as intent or knowledge requires reversal because the 'Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged'"), cert. denied, 513 U.S. 965 (1994).

[8] See, *e.g.*, *People* v. *Kobrin*, 903 P.2d 1027 (Cal. 1995); *People* v. *Mattas*, 645 P.2d 254 (Colo. 1982); *Walls* v. *State*, 560 A.2d 1038 (Del.), cert. denied, 493 U.S. 967 (1989); *Carpenter* v. *Commonwealth*, 771 S.W.2d 822 (Ky. 1989); *Commonwealth* v. *Thomas*, 514 N.E.2d 1309 (Mass. 1987); *State* v. *Bluhm*, 460 N.W.2d 22 (Minn. 1990); *Hunter* v. *State*, 684 So. 2d 625 (Miss. 1996); *State* v. *Forsyth*, 642 P.2d 1035 (Mont. 1982); *State* v. *Myers*, 510 N.W.2d 58 (Neb. 1994); *Lomas* v. *State*, 639 P.2d 551 (Nev. 1982); *State* v. *Federico*, 510 A.2d 1147 (N.J. 1986); *People* v. *Flynn*, 589 N.E.2d 383 (N.Y. 1992); *Slusher* v. *State*, 814 P.2d 504 (Okla. Crim. App. 1991); *State* v. *Bryant*, 670 A.2d 776 (R.I. 1996); *State* v. *Gibson*, 908 P.2d 352 (Utah 1995); *State* v. *Aumick*, 894 P.2d 1325 (Wash. 1995); *State* v. *Miller*, 400 S.E.2d 611 (W. Va. 1990); *Vigil* v. *State*, 859 P.2d 659 (Wyo. 1993). See also *Hereford* v. *State*, 615 So. 2d 1303 (Ala. Crim. App. 1993); *Dawson* v. *State*, 894 P.2d 672 (Alaska Ct. App. 1995); *State* v. *Brown*, 647 A.2d 17 (Conn. App. Ct. 1994); *Jones* v. *State*, 666 So. 2d 995 (Fla. Dist. Ct. App. 1996); *Robinson* v. *State*, 473 S.E.2d 519 (Ga. Ct. App. 1996); *McKinney* v. *State*, 553 N.E.2d 860 (Ind. Ct. App. 1990); *Monk* v. *State*, 619 A.2d 166 (Md. Ct. Spec. App. 1993); *State* v. *Rhome*, 462 S.E.2d 656 (N.C. Ct. App. 1995); *State* v. *Monroe*, 790 P.2d 1188 (Or. Ct. App. 1990); *Commonwealth* v. *Tharp*, 541 A.2d 14 (Pa. Super. Ct. 1988); *State* v. *Moriarty*, 321 N.W.2d 324 (Wis. Ct. App. 1982).



The conflict over whether *Gaudin* errors and other elemental omissions are subject to harmless-error review has also been widely recognized. See, *e.g.*, *Teel* v. *Tennessee*, 498 U.S. 1007 (1990) (White, J., dissenting from denial of certiorari) (noting that "a conflict of authority exists concerning the availability of harmless-error analysis" when a jury is not instructed on an essential element of the crime charged); *Rogers*, 94 F.3d at 1524 n.11 ("We believe that this discord reflects the gravity of the issue, and we realize, of course, that our opinion in this case can merely provide controlling authority within our own Circuit. For these reasons, we join the Ninth Circuit in noting that further guidance and clarification would be extremely helpful"); *Hoover*, 802 F.2d at 176-77 (noting the split in authority and stating that "there is not a clearly preferred answer to the question of whether the failure to instruct on an essential element of the crime charged may be considered harmless"); *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 n.2 (9th Cir. 1991) (noting that "[t]he law in this area is an unfinished symphony," and that "[a]dditional guidance and clarification would be helpful"); *United States* v. *Parmelee*, 42 F.3d 387, 392 (7th Cir. 1994) (same), cert. denied, 516 U.S. 812 (1995).

In large part, this controversy derives from a fundamental disagreement over the nature and constitutional significance of an instructional omission on an element. Some circuits, like the First and Sixth, hold that a complete instruc-

tional omission is tantamount to a directed verdict by the trial court on the omitted element, and therefore cannot be harmless. See, *e.g.*, *Hoover*, 802 F.2d at 177 ("when an instruction prevents the jury from considering a material issue, it is equivalent to a directed verdict on that issue and therefore cannot be considered harmless"); *United States* v. *Lopez*, 71 F.3d 954, 960 (1st Cir. 1995) (same), cert. denied, 518 U.S. 1008 (1996). Other courts, like the Eleventh Circuit, have expressly rejected this view, refusing to "equate an instructional omission with a directed verdict" on the ground that "failure to instruct on a particular element does not completely prohibit the jury from considering evidence relevant to that issue." *Rogers*, 94 F.3d at 1526 n.13. See also *Hennessy* v. *Goldsmith*, 929 F.2d 511, 515 (9th Cir. 1991) (refusing to equate failure to instruct the jury on an essential element with a directed verdict on that element).

Whatever the answer, the prejudice to petitioner and others resulting from this split of authority is plain. Had petitioner resided in any of the eight circuits that refuse to apply harmless-error analysis to *Gaudin* errors and other elemental omissions, his tax fraud conviction would have been reversed, entitling him to a new trial before a properly instructed jury.

It also is apparent that absent Supreme Court review, this question will undoubtedly continue to plague the state and federal courts in *Gaudin* and other cases where elements have been removed from the jury's consideration. Given the sheer volume of recent cases decided by the state and federal courts of appeals addressing this important issue, without any consensus, there is also no reason to believe that the lower courts will be able to resolve their disagreement without Supreme Court guidance. Review by this Court thus is warranted "to address this important issue of constitutional law." *Rogers*, 118 S. Ct. at 677 (O'Connor, J., concurring).



### B. The Court of Appeals' Holding Squarely Conflicts With This Court's Harmless-Error Decisions.

It is undisputed that materiality is an element of the tax fraud offense (26 U.S.C. § 7206(1)) of which petitioner stands convicted. It also is uncontested that the district court explicitly removed that element from the jury's consideration by (1) deciding that element itself, (2) charging the jury in its tax fraud instruction that the jury "need not consider" materiality, and (3) instructing that materiality "is not a question for the jury to decide." App., *infra*, 34a. Thus, as the court of appeals held, the trial court clearly violated petitioner's constitutional right to a jury trial under *United States* v. *Gaudin*, 515 U.S. 506 (1995). The court of appeals concluded, however, that this constitutional error was subject to harmless-error review, and in fact was harmless based on its review of the record evidence. App., *infra*, 13a.

The court of appeals' use of the "harmless error" doctrine to supply a finding that the jury never made cannot be reconciled with this Court's decisions that consistently have safeguarded the defendant's right to a jury determination on *all* essential elements of the offense charged. See, *e.g.*, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). Under *Sullivan*, the trial court's failure to instruct the jury on an element of an offense, and the jury's resultant failure to determine whether that element was established beyond a reasonable doubt, cannot constitutionally be "harmless" regardless of an appellate court's perception of the record or its certainty of guilt.

A criminal defendant's constitutional right to a trial by jury "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'" *Sullivan*, 508 U.S. at 277. Accord *United Bhd. of Carpenters* v. *United States Bay Counties Dist. Council*, 330 U.S. 395, 409-10 (1947) ("guilt is determined by the jury,

not the court"). As Justice Frankfurter explained for the Court more than 50 years ago:

> In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

*Bollenbach* v. *United States*, 326 U.S. 607, 615 (1946). See also Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1191 (1995).

The Constitution "gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Gaudin*, 515 U.S. at 522-23. Accord *In re Winship*, 397 U.S. 358, 364 (1970) ("we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with he is charged"). This is a right that cannot be made to depend upon a court's perception of the defendant's guilt or the weight of the record evidence.[9] A court "may not direct a

[9] If the instructional omission does not prevent the reviewing court from concluding, beyond a reasonable doubt, "that the jury actually made the finding that inheres in the [omitted] element," then harmless error review may be applied. See *California* v. *Roy*, 117 S. Ct. 337, 339-40 (1996) (Scalia, J., concurring) (citing *Carella*, 491 U.S. at 271 (Scalia, J., concurring in the judgment)). But, as noted *supra* at 15, this case does not involve one of those "rare situations" where what the jury found can fairly be said to encompass what it was told not to find. *Carella*, 491 U.S. at 270



verdict for the State, no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277. Accord, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) ("a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, regardless of how overwhelmingly the evidence may point in that direction") (citing *Carpenters*, 330 U.S. at 408; *Sparf* v. *United States*, 156 U.S. 51, 105 (1895)).

In confronting the question of whether, and to what extent, instructional errors are amenable to harmless-error scrutiny, the Court consistently has adhered to the bedrock principle that an appellate court may not serve as the finder of fact. In *Carpenters*, for instance, the trial court misdescribed an element by failing to properly charge the jury that a labor union could be convicted of an antitrust conspiracy only if the union actively participated in the unlawful acts in question. Because the trial court's error completely foreclosed the jury's consideration of whether the defendants had actively participated in the conspiracy—an element of the crime charged—the Court refused to analyze or weigh the record evidence of active participation, notwithstanding its apparent strength. 330 U.S. at 408-09.

In contrast to the circumstances presented in *Carpenters*, it is possible that a jury, while misinstructed on an element, may nonetheless find the facts necessary to establish the proper element beyond a reasonable doubt. For instance, in *Pope* v. *Illinois*, 481 U.S. 497 (1987), the jury was instructed that it should base its determination of whether the materials at issue

(quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion)). The trial court expressly instructed the jury that materiality "was not for the jury to decide," and itself directed a finding of materiality in favor of the prosecution. App., *infra*, 34a.

were obscene upon how ordinary adults in the State of Illinois would view the material. The Court ruled that this instruction was flawed under the First Amendment, because obscenity should be judged not from the perspective of "an ordinary member of any given community," but rather from that of "a reasonable person." *Id.* at 500-501. The Court remanded the case to the state appellate court to determine whether the error was harmless. *Id.* at 504. As Justice Scalia later explained, the error in *Pope* was subject to harmless-error review because "no rational juror could plausibly have found the magazines utterly lacking in value under a community standard and come to a different conclusion under a reasonable person standard." *Carella*, 491 U.S. at 271 (concurring opinion). Thus, the appellate court in *Pope* validly could conclude that the jury *actually found* the required element notwithstanding its misdescription in the jury instructions.

Read in tandem, *Carpenters* and *Pope* demonstrate that, at least analytically, the wholesale omission of an element is "as easily characterized as a 'misdescription of an element' of the crime, as it is characterized as an error of 'omission.'" *California* v. *Roy*, 117 S. Ct. 337, 339 (1996) (per curiam). Indeed, as this Court noted in *Johnson*, 117 S. Ct. at 1550, "[t]he failure to submit materiality to the jury, as in this case, can just as easily be analogized to improperly instructing the jury on an element of the offense * * *, an error which is subject to harmless-error analysis, as it can be to failing to give a proper reasonable-doubt instruction altogether." (Citations omitted). Omissions and misdescriptions each can "deprive[] the jury of its factfinding role" and thus will "circumscribe the availability of harmless-error analysis." *Carella*, 491 U.S. at 269, 270 (Scalia, J., concurring). But in either event, the instructional error can be subject to harmless-error scrutiny *only* when the predicate facts found by the jury under the instructions actually given "are so closely related" to



the element omitted by the trial court "that no rational jury could find those facts without also finding" the facts necessary to establish the omitted element beyond a reasonable doubt, such that "making those findings is functionally equivalent to finding the [omitted] element." *Sullivan*, 508 U.S. at 281.

The Eleventh Circuit's decision cannot be reconciled with the Court's harmless-error decisions. The court of appeals acknowledged "[t]he district court * * * erred in not submitting the element of materiality to the jury regarding Neder's § 7206(1) offenses" (App., *infra*, 10a), and that the jury never made any findings concerning materiality. The court nevertheless declared harmless the removal of materiality from the jury instructions. The court justified its use of the harmless-error doctrine by concluding that because "materiality was not in dispute," the trial court's directed finding of materiality in favor of the prosecution "'did not contribute to the verdict obtained." App., *infra*, 13a (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991)). Such reasoning, however, reflects a fundamental misunderstanding of the harmless-error doctrine.

The reason why the harmless-error doctrine cannot be applied in this case has *nothing* to do with the weight of the evidence, or whether materiality was actively disputed at trial (which it was). It is inapplicable because without a complete jury verdict on each element of the offense charged, "there has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of *Chapman* review is simply absent." *Sullivan*, 508 U.S. at 280. As Justice Scalia has explained, "[t]he absence of a formal verdict on [each element] can not be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury." *Roy*, 117 S. Ct. at 339 (concurring opinion).

The court of appeals reversibly erred in applying the harmless-error doctrine to the *Gaudin* error below. Harmless-error review has no place where the jury never made a constitutionally valid determination of guilt on each element of the offense charged. Without a complete verdict, "the conviction must be reversed, no matter how inescapable the findings to support that verdict might be." *Roy*, 117 S. Ct. at 339 (Scalia, J., concurring). Accord *Old Chief* v. *United States*, 117 S. Ct. 644, 659 ( 1997) (O'Connor, J., dissenting) (same). See also G. Chernack, Note, *Silence Cannot Be Harmless: United States* v. *Rogers*, 106 YALE L.J. 2305, 2309 (1997) ("By completely undermining the promise of trial by jury, an omitted instruction should lead to automatic reversal").

In short, regardless of the Eleventh Circuit's perception of the record, petitioner's tax fraud conviction cannot stand for the simple reason that one of the essential elements of the offense with which he was changed was decided *not* by the jury, but by the court. Such an error cannot constitutionally be harmless, for "'the error in such a case is that the wrong entity judged the defendant guilty.'" *Sullivan*, 508 U.S. at 280 (quoting *Rose*, 478 U.S. at 578). The Eleventh Circuit's affirmance of petitioner's tax fraud conviction must be reversed.

## II. THE ELEVENTH CIRCUIT'S HOLDING THAT MATERIALITY IS NOT AN ELEMENT OF THE FEDERAL MAIL, WIRE AND BANK FRAUD STATUTES CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT.

### A. The Courts of Appeals Are Deeply Split As To Whether Materiality Is An Element Of Federal Mail, Wire And Bank Fraud.

Although the trial court removed materiality from the jury's consideration, the court of appeals affirmed petitioner's mail, wire and bank fraud convictions on the ground that materiality is not an element of any of those statutes, and that



no *Gaudin* error thus was committed. As demonstrated below, the Eleventh Circuit's decision conflicts with those of at least three other circuits that have held that materiality is an element of these statutes. Accordingly, and because decisions of the courts of appeals truly reflect a *striking* degree of confusion as to this important question, Supreme Court review is warranted.

The operative language of the mail, wire and bank fraud statutes is essentially the same. Each punishes a "scheme or artifice" either "to defraud" or to "obtain[]" money or property "by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343, 1344. Citing this Court's decision in *United States* v. *Wells*, 117 S. Ct. 921 (1997), the court of appeals held that materiality is not an element of these offenses, but recognized that the circuits have been unable to reach agreement on this question. See, *e.g.*, App., *infra*, 7a n.4, 9a-10a (noting conflicting authority); *United States* v. *Lopez*, 71 F.3d 954, 962 (1st Cir. 1995) (noting that the First Circuit's "position is at odds with some circuits and with both of the standard instruction treatises"), cert. denied, 518 U.S. 1008 (1996). This conflict has only deepened further since *Wells* was decided.

The court of appeals' holding that materiality is not an element of the mail, wire and bank fraud offenses follows similar pre-*Wells* decisions from the First and Fifth Circuits.[10]

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[10] See, *e.g.*, *United States* v. *Faulhaber*, 929 F.2d 16, 18 (1st Cir. 1991) (district court did not err in failing to instruct jury on materiality in prosecution under §§ 1341 and 1344); *United States* v. *Fraza*, 106 F.3d 1050, 1053 (1st Cir. 1997) (holding that § 1344 does not require "proof that the statements were 'materially false'"); *Abell* v. *Potomac Ins. Co.*, 858 F.2d 1104, 1129 (5th Cir. 1988) ("[m]ateriality and reliance . . . are not elements of either wire fraud or mail fraud"), vacated on other grounds, 492 U.S. 914 (1989); *United States* v. *Moser*, 123 F.3d 813, 826 (5th Cir.) (same), cert. denied, 118 S. Ct. 642 (1997).

However, the Eleventh Circuit's holding is squarely at odds with other decisions of these Circuits, and with rulings from the Second, Sixth, Seventh, Ninth, Tenth and D.C. Circuits (both before and after *Wells*) which have held that materiality *is* an element of the mail, wire and bank fraud offenses.[11]

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[11] See, *e.g.*, *United States* v. *Smith*, 46 F.3d 1223, 1236 (1st Cir.) ("We agree that § 1344(2) requires a material misrepresentation."), cert. denied, 516 U.S. 864 (1995); *United States* v. *Von Barta*, 635 F.2d 999, 1006 n.14 (2d Cir. 1980) (in mail fraud prosecution, "the deceit must have gone to the nature of the bargain; that is, any nondisclosures or affirmative misrepresentations must have been material") (citation omitted), cert. denied, 450 U.S. 998 (1981); *United States* v. *Jobe*, 101 F.3d 1046, 1061 (5th Cir. 1996) (§ 1344 has "up to now clearly incorporated a materiality element"), cert. denied, 118 S. Ct. 81 (1997); *Central Distribs. of Beer* v. *Conn*, 5 F.3d 181, 184 (6th Cir. 1993) (plaintiff "cannot maintain a civil RICO claim" alleging mail fraud and wire fraud as predicate acts "absent evidence that the defendants made misrepresentations or omissions of material fact"), cert. denied, 512 U.S. 1207 (1994); *United States* v. *DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) (under § 1341, "a defendant must knowingly make a material misrepresentation or knowingly omit a material fact"); *United States* v. *Dunn*, 961 F.2d 648, 651 (7th Cir. 1992) (in mail fraud prosecution, "the government must prove that the defendant has knowingly made a 'material misrepresentation or omission'") (quoting *United States* v. *York*, 933 F.2d 1343, 1349 (7th Cir.), cert. denied, 502 U.S. 916 (1991)); *United States* v. *Davis*, 989 F.2d 244, 247 (7th Cir. 1993) (acquittal was required under § 1344(2) because "the government failed to prove that Davis's misrepresentation * * * was material"); *United States* v. *Halbert*, 640 F.2d 1000, 1008 (9th Cir. 1981) ("a requirement of materiality should apply to the misrepresentations which form the basis for a mail fraud violation"); *United States* v. *Nash*, 115 F.3d 1431, 1436 (9th Cir. 1997) (holding that "the materiality requirement for section 1344 * * * survives *Wells*"), cert. denied, 118 S. Ct. 1054 (1998); *United States* v. *Sayan*, 968 F.2d 55, 61 n.7 (D.C. Cir. 1992) (§ 1344(2) "require[s] a material misrepresentation"). See also, e.g., *United States* v. *Rodriguez*, 1998 WL 130748, *4 (2d Cir. 1998) ("the misrepresentations must be material to give rise to liability under" § 1344); *United States* v. *Campbell*, 64 F.3d 967, 975 (5th Cir. 1995) ("Under § 1344(2), the defendant must make a material misrepresentation to the bank"); *United States* v. *Hollis*, 971 F.2d 1441, 1452 (10th Cir. 1992) (under § 1344, "[c]ertainly * * * if the misrepresentations were immaterial, then the defendant has a valid defense"), cert. denied, 507 U.S. 985 (1993)..



Other circuits have taken an intermediate approach, staking out an indeterminate middle ground between those decisions that clearly identify materiality as an element of these statutory offenses and those that reject a materiality requirement. For instance, the Tenth Circuit has held that while wire fraud requires a "showing of materiality," materiality is not actually an "independent element" of the offense. *United States* v. *Cochran*, 109 F.3d 660, 667 & n.3 (10th Cir. 1997). The court explained:

> Although materiality is not an independent element of a wire fraud prosecution, there is a materiality aspect to the determination whether the acts of an accused give rise to a scheme to defraud that is appropriately submitted to the jury as one component of the larger factual question as to the existence of fraud and a scheme to defraud.

*Id.* at 667 n.3 (internal quotations omitted). See also *United States* v. *Slaughter*, 128 F.3d 623, 629 (8th Cir. 1997) ("We join our sister court in the Tenth Circuit in finding that materiality is not a separate essential element of wire fraud"). The Seventh Circuit, on the other hand, has held that while § 1343 requires a showing of materiality, because Congress did not "want to classify immaterial lies as frauds for purposes of the mail- and wire-fraud statutes," there is no need to instruct the jury separately on materiality since "the term 'fraud' embodies the concept of materiality" and "[a]n instruction in the language of the statute adequately puts the issue before the jury." *United States* v. *Coffman*, 94 F.3d 330 (7th Cir. 1996), cert. denied, 117 S. Ct. 1426 (1997).

The circuit split over this issue has deepened further since *Wells*. Indeed, the Eleventh Circuit below openly recognized that its decision conflicts with other post-*Wells* cases. App., *infra*, 7a n.4, 9a-10a. On the one hand, like the Eleventh Circuit, the Fifth Circuit has agreed that *Wells* "casts doubt" on earlier cases holding that materiality is an element of § 1344. *United States* v. *DuPre*, 117 F.3d 810, 815 (5th Cir. 1997), cert. denied, 118 S. Ct. 857 (1998). The Ninth and Tenth Circuits, however, have explicitly held that *Wells* has no bearing on the question of whether materiality is an element of the mail, wire and bank fraud offenses. See, *e.g.*, *Nash*, 115 F.3d at 1436 ("the materiality requirement for section 1344 * * * survives *Wells*"); *Cochran*, 109 F.3d at 667 n.3 (*Wells* "is not to the contrary" of the Tenth Circuit's view that there is a "materiality aspect" to § 1343). *Cf. United States* v. *Shunk*, 113 F.3d 31, 34 (5th Cir. 1997) (holding that materiality remains an element of 18 U.S.C. § 1006 because *Wells* "deal[s] with a different section"). In further contrast, other post-*Wells* decisions have held that materiality is an element of these crimes without any mention of *Wells* at all. See, *e.g.*, *United States* v. *Rodriguez*, 1998 WL 130748, *4 (2d Cir. 1998) ("misrepresentations must be material" under § 1344); *DeSantis*, 134 F.3d at 764 (§ 1341 requires a "material misrepresentation" or the omission of a "material fact").

In short, the circuits are thoroughly confused as to whether materiality is an element of the federal mail, wire and bank fraud statutes. Yet, as statutes whose violation can lead to criminal sanctions, such glaring uncertainty over their elements is intolerable, for it denies "the populace 'fair warning' of the line between criminal and lawful activity." *McElroy* v. *United States*, 455 U.S. 642, 658 (1982). As Justice Holmes wrote in *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931), "[a] fair warning should be given to the world in language that the common world will understand, of what the law intends to do



if a certain line is passed." Accord *United States* v. *Lanier*, 117 S. Ct. 1219, 1225 (1997) (describing the "fair warning" requirement as an essential ingredient of due process).

Under the Constitution, it is also unacceptable for the elements of a federal criminal offense to vary depending upon the circuit in which the defendant happens to reside. Indeed, to allow the elements of these criminal offenses arbitrarily to depend upon the law of each circuit would violate the well-established canon that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). Accord *Crandon* v. *United States*, 494 U.S. 152, 158 (1990) (same); J. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 195 (1985) ("Judicial crime creation is a thing of the past. It is both unacceptable and unnecessary").

Given the frequency of mail, wire and bank fraud prosecutions (see, *e.g.*, *Carpenter* v. *United States*, 484 U.S. 19 (1987); *United States* v. *O'Hagan*, 117 S. Ct. 2199 (1997); *McNally* v. *United States*, 483 U.S. 350 (1987); *Schmuck* v. *United States*, 489 U.S. 705 (1989); *Tanner* v. *United States*, 483 U.S. 107 (1987)), the question of whether materiality is an element of §§ 1341, 1343 and 1344 is certain to recur. Resolution of this question also will be significant in civil cases, since "the large majority of civil RICO complaints use mail fraud, wire fraud or securities fraud as the required predicate offenses." *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 149 (1987). See also, *e.g.*, *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985); *Holmes* v. *Securities Investor Protection Corp.*, 503 U.S. 258 (1992); 18 U.S.C. § 1961(1)(B). The Court should grant the petition to resolve this crucial question and bring needed clarity to this important area of the law.

### B. The Court Of Appeals' Materiality Holding Is Contrary To This Court's Statutory And Common Law Decisions That Consistently Have Found Materiality To Be An Essential Element Of Fraud.

In holding that materiality is not an element of the mail, wire and bank fraud offenses, the Eleventh Circuit relied entirely on this Court's recent decision in *Wells*, 117 S. Ct. at 926-28, which held that materiality is not an element of 18 U.S.C. § 1014. The court of appeals concluded that materiality is not an element of §§ 1341, 1343 and 1344 for two reasons. *First*, it relied heavily on the fact that these statutes "do not contain the word 'material.'" App., *infra*, 7a. *Second*, the court noted that § 1341, which served as the model for §§ 1343 and 1344, "was enacted as part of the recodification of the federal criminal code in 1948." *Ibid.* As demonstrated below, the Eleventh Circuit's materiality holding is plainly wrong, and reflects a fundamental misreading of *Wells*.

1. Unlike §§ 1341, 1343 and 1344, which proscribe a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," *Wells* involved the application of 18 U.S.C. § 1014, which prohibits certain "false statement[s]" to federally insured banks. In holding that the term "false statement" does not include a materiality component, *Wells* first reaffirmed the presumption that "Congress incorporates the common-law meaning of the terms it uses if those 'terms * * * have accumulated settled meaning under * * * the common law.'" 117 S. Ct. at 927 (quoting *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322 (1992)). But finding no evidence that the term "false statement" carried any common law meaning, or that Congress intended that term to require proof of materiality, the Court held that materiality was not an element of § 1014. *Wells*, 117 S. Ct. at 926-28.



Nothing in *Wells*, however, even remotely suggests that materiality is not an element of §§ 1341, 1343 and 1344. To the contrary, *Wells*' reaffirmation of the rule that common law statutory terms convey their common law meaning inexorably leads to the conclusion that materiality is an element of the federal mail, wire and bank fraud offenses.

Unlike the "false statement" statute in *Wells*, §§ 1341, 1343 and 1344 each explicitly prohibits "fraud." In particular, they punish a "scheme or artifice" either "to defraud" or to "obtain[]" money or property "by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343, 1344. The mail fraud statute, which served as the model for the wire and bank fraud statute, was crafted in 1872 as "a general proscription against using the mails to initiate correspondence in furtherance of 'any scheme or artifice to defraud.'" *McNally* v. *United States*, 483 U.S. 350, 356 (1987). As this Court explained in *Carpenter* v. *United States*, 484 U.S. 19 (1987), "the words 'to defraud' in the mail fraud statute have the 'common understanding' of 'wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *Id.* at 27 (quoting *McNally*, 483 U.S. at 358 (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). See also *Durland* v. *United States*, 161 U.S. 306, 312 (1896).

The "common understanding" of "fraud" has always included materiality as one of its essential elements. For more than a century, this Court has emphasized "the fact that actionable fraud requires a material misrepresentation or omission." *BMW* v. *Gore*, 517 U.S. 559, 579 (1996) (citing RESTATEMENT (SECOND) OF TORTS § 538 (1977); W. Keeton, et al., *Prosser & Keeton on Law of Torts* § 108 (5th ed. 1984)). See also *Smith* v. *Richards*, 38 U.S. (13 Pet.) 26, 39 (1839) (a "misrepresentation must be of something *material*, constituting

an inducement or motive * * * to purchase, and by which [the aggrieved party] has been actually misled to his injury") (emphasis added); *Stewart* v. *Wyoming Cattle Ranche Co.*, 128 U.S. 383, 388-89 (1888) (same); 1 J. Story, *Commentaries on Equity Jurisprudence* § 271 (1886) ("[t]he materiality of the alleged fraudulent statements * * * is one of the necessary ingredients of the offence"); *id.* §§ 260-61, 267-71. It is black-letter law that "one of the fundamental principles which pervades jurisprudence involving fraud, and the maintenance of actions or defenses based thereon, is that to constitute fraud in any case, the facts misrepresented or concealed must have been material facts which substantially affect the interests of the person alleged to have been defrauded." 37 AM. JUR. 2D *Fraud and Deceit* § 177, at 236-37 (1964) (collecting cases).

Against this common law backdrop, it is no surprise that this Court has held that materiality to be an element of other statutes that prohibit fraud but do not mention the word "material." For instance, this Court has held that materiality is an element of securities fraud statutes such as § 10(b) of the Securities Exchange Act of 1934, which prohibits "any manipulative or deceptive device or contrivance" but makes no mention of "materiality." See, *e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 474 (1977). See also 7 L. LOSS & J. SELIGMAN, *Securities Regulation* 3421-31 (3d ed. 1991) (noting that materiality is an essential element of securities fraud).

By leaping to the conclusion that §§ 1341, 1343 and 1344 contain no materiality requirement simply because they do not use the word "material," the Eleventh Circuit misapplied this Court's decision in *Wells* and overlooked the fact that unlike the statute in *Wells*, the statutes here explicitly prohibit "fraud," a term whose common law meaning always has required proof of a material misrepresentation or omission.



2. The court of appeals also wrongly relied on the fact that the mail fraud statute (§ 1341) was recodified as part of the Federal Criminal Code in 1948. It is certainly true that *Wells* relied on the fact that § 1014 was recodified in 1948 as a conglomeration of 13 earlier statutes, 10 of which had never required materiality. 117 S. Ct. at 928. Here, on the other hand, § 1341 was merely *renumbered* in 1948. The mail fraud statute, originally enacted in 1872,[12] and amended in 1909,[13] has *always* targetted "fraud," and was recodified in 1948 without *any* substantive change in its language or scope. As the Senate Report explained, the purpose of the recodification was simply to "correct[] typographical and other minor errors, and clarif[y] the language of some sections to conform more closely to the original law, or to remove ambiguities which have been discovered." S. Rep. No. 303, 81st Cong., 1st Sess. (1949), reprinted in 1949 U.S.C.C.A.N. 1248, 1248. Thus, the Eleventh Circuit's reliance on the fact that "§ 1341 was enacted as part of the recodification of the federal criminal code in 1948" (App., *infra*, 7a) is wholly misplaced.

In sum, the Eleventh Circuit's holding that materiality is not an element of 18 U.S.C. §§ 1341, 1343 and 1344 is patently erroneous and should be reversed.

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[12] See Act of June 8, 1872, ch. 335, § 305, 17 Stat. 283, 323 (applicable to "any person having devised or intending to devise any scheme or artifice to defraud" through the use of the mails).

[13] See Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130 ("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * *, or any scheme or artifice to obtain money by or through correspondence * * *, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement * * * in any post-office * * * shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both").

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL G. LAWRENCE
*Law Offices of*
*Noel G. Lawrence, P.A.*
*100 Riverside Avenue*
*Jacksonville, Florida 32202*
*(904) 733-1237*

JAVIER H. RUBINSTEIN
*Counsel of Record*
GARY S. FEINERMAN
ROBERT M. DOW, JR.
KASPAR J. STOFFELMAYR
*Mayer, Brown & Platt*
*190 South LaSalle Street*
*Chicago, Illinois 60603*
*(312) 782-0600*

*Counsel for Petitioner*

# APPENDIX

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ELLIS E. NEDER, Jr., Defendant-Appellant.

No. 92-2929.

March 19, 1998.

Noel G. Lawrence, Jacksonville, FL, for Defendant-Appellant.

Stephen Kunz, Charles Truncale, Jacksonville, FL, Tamra Phipps, Asst. U.S. Atty., Tampa, FL, for Plaintiff-Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT and HULL, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

HULL, Circuit Judge:

Appellant Ellis E. Neder, Jr. appeals his convictions on various false statement, fraud, conspiracy, and racketeering offenses. Neder contends that the district court erred in failing to submit the issue of materiality to the jury with respect to his fraud and false statement offenses.[1] After review, we affirm.

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[1] Neder also asserts that (1) the counts in the indictment were multiplicious and duplicitous, (2) the district court erred in denying his motion for change of venue based on pre-trial publicity, (3) there was insufficient evidence to convict, (4) the district court made erroneous evidentiary rulings, (5) the prosecutor suborned perjury and engaged in a

## I. FACTS

### A. Neder's Fraudulent Activities

Between 1984 and 1988, Neder engaged in fraudulent activities related to land acquisition, land development, and construction projects. Through his schemes, Neder fraudulently obtained over $30 million in loans from various lending institutions. Neder deposited approximately $7 million in profits on these transactions into his personal account. Testimony at trial revealed that none of the loans would have been approved had the lending institutions been aware of the true nature of the transactions. Neder later defaulted on these loans.

Neder also failed to report income of $1,372,360 in 1985 and $4,355,766 in 1986. Neder does not contest that he did not report this money as income or profits from one of his schemes. Instead, Neder testified that he was advised that he was not required to report this money as income.

### B. The Court's Jury Charge

Neder was indicted for mail fraud, wire fraud, bank fraud, tax fraud, and making illegal false statements. The indictment contained materiality as an element of many of these offenses. Neder and the government submitted proposed jury instructions relating to the elements of the charged offenses. The district court's final jury charge included "materiality" as an element of the fraud and false statement offenses. However, the district court instructed the jury that if it found beyond a

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pattern of misconduct, (6) prosecutorial misconduct and various trial errors combined to violate his due process rights, and (7) the government is precluded from arguing that materiality is not an element of Neder's false statement and fraud offenses. After review, we conclude that these contentions are without merit.



reasonable doubt that the alleged statements, representations, or promises were false, it need not consider whether they were material because materiality was not an issue for the jury to decide. The court entered its own findings regarding materiality outside the presence of the jury. Neder timely objected to the court's findings and its failure to submit the issue of materiality to the jury.

## II. DISCUSSION

We examine (a) whether materiality is an element of the false statement, wire fraud, mail fraud, bank fraud, and tax fraud offenses;[2] and (b) whether the district court committed reversible error in not submitting the materiality issues to the jury.

### A. False Statements: 18 U.S.C. § 1014

Two recent Supreme Court decisions begin our analysis. In *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995), the Supreme Court assumed materiality to be an element under 18 U.S.C. § 1001, which proscribes certain false statements, and held that the issue of materiality under § 1001 is for the jury, not the judge, to decide. The district judge in *Gaudin* erroneously failed to submit the materiality issue to the jury. Id. at 523, 115 S.Ct. at 2320. We have since referred to this type of error as a *Gaudin* error. See, *e.g.*, *United States v. Fern*, 117 F.3d 1298, 1307 (11th Cir.1997).

Two years later in *United States v. Wells*, ___ U.S. ___, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997), the Supreme Court

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[2] Neder's conspiracy and RICO convictions under 18 U.S.C. §§ 371 and 1962 were based on Neder's violations of the false statement and fraud statutes. In affirming Neder's convictions under the false statement and fraud statutes, we affirm Neder's conspiracy and RICO convictions as well.

held that materiality is not an element of the false-statement offense in 18 U.S.C. § 1014. Thus, the Court concluded that the district court had not erred in not submitting the question of materiality to the jury. Synthesizing *Gaudin* and *Wells*, if materiality is not an element, failing to submit the issue to the jury is not error; but if materiality is an element, a court errs in failing to submit the issue to the jury.

In deciding in *Wells* that materiality is not an element under § 1014, the Supreme Court focused on the language of § 1014, which states:

> Whoever knowingly makes any false statement or report ... for the purpose of influencing in any way the action of ... any institution the accounts of which are insured by the Federal Deposit Insurance Corporation ... shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both....

18 U.S.C. § 1014. The Supreme Court emphasized that the text of § 1014 does not mention materiality:

> Nowhere does [§ 1014] further say that a material fact must be the subject of the false statement or so much as mention materiality. To the contrary, its terms cover "any" false statement that meets the other requirements in the statute, and the term "false statement" carries no general suggestion of influential significance....

*Wells*, ___ U.S. at ___, 117 S.Ct. at 927.

The Supreme Court also acknowledged the presumption that "Congress incorporates the common-law meaning of the terms it uses if those 'terms have accumulated settled meaning



under ... the common law.'" *Id.* (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 112 S.Ct. 1344, 1348, 117 L.Ed.2d 581 (1992)). However, the Supreme Court concluded that the respondents had failed to make any showing that the term "false statement" acquired any implication of materiality at common law. *Id.*

Finally, the Supreme Court determined that the legislative history of § 1014 supported its natural reading. *Id.* at ___, 117 S.Ct. at 928. Of particular significance was the fact that "[w]hen Congress originally enacted § 1014 as part of its recodification of the federal criminal code in 1948, it explicitly included materiality in other provisions involving false representations." *Id.* Moreover, "of the 13 provisions brought together by § 1014, 10 had previously contained no express materiality provision and received none in the recodification, while 3 of the 13 had contained express materiality requirements and lost them in the course of consolidation." *Id.* The Court concluded that "[t]he most likely inference in these circumstances is that Congress deliberately dropped the term 'materiality' without intending materiality to be an element of § 1014." *Id.*

In this case, Neder's § 1014 conviction is controlled by Wells's holding that materiality is not an element under § 1014. Therefore, the district court did not commit a Gaudin error in failing to submit the issue of materiality to the jury because materiality is not an element of a § 1014 offense.[3]

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[3] We recently relied on *Wells* in determining that materiality is not an element under 15 U.S.C. § 645(a) in *United States v. Condon*, 132 F.3d 653, 656 (11th Cir.1998), or 18 U.S.C. § 1010 in *United States v. DeCastro*, 113 F.3d 176, 179 (11th Cir.1997).

B. Mail Fraud And Wire Fraud: 18 U.S.C. §§ 1341 And 1343

We now turn to whether materiality is an element under §§ 1341 and 1343. As an initial matter, we examine the pre-Wells decisions of this court regarding the elements of §§ 1341 (mail fraud) and 1343 (wire fraud). Our decisions list the elements of these offenses without listing materiality as one of the elements. See *United States v. Pitt*, 717 F.2d 1334, 1339-40 (11th Cir.1983) (listing elements of wire fraud without including materiality); *United States v. Scott*, 701 F.2d 1340, 1343 (11th Cir.1983) (listing elements of mail fraud without including materiality). However, no cases directly hold that materiality is not an element under §§ 1341 and 1343.

Therefore, in determining whether materiality is an element under §§ 1341 and 1343, we begin with the Supreme Court's admonition to examine the statutes' language. Section 1341 proscribes the act or acts of using the mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises...." 18 U.S.C. § 1341; see also *United States v. Ethridge*, 948 F.2d 1215, 1216 (11th Cir.1991). The text of § 1343 is substantially similar to § 1341 and states as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined or imprisoned ... or both.



18 U.S.C. § 1343.

Sections 1341 and 1343 are similar to § 1014 in several respects. Foremost, §§ 1341 and 1343 do not contain the word "material." Further, § 1341 was enacted as part of the recodification of the federal criminal code in 1948, and § 1343 was patterned after § 1341. Based on these factors considered in Wells, we conclude that materiality is not an element of fraud offenses in §§ 1341 and 1343.[4] As discussed below, we reach the same conclusion regarding § 1344.

C. Bank Fraud: 18 U.S.C. § 1344

In *United States v. Goldsmith*, 109 F.3d 714 (11th Cir.1997), this court lists materiality as an element under § 1344. *Id.* at 715. However, *Goldsmith* and the cases on which it relies do not directly address whether materiality is an element under § 1344.[5] For example, after listing materiality as an element under one part of § 1344, the *Goldsmith* panel did not mention the word "material" in the remainder of its opinion

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[4] In *United States v. Cochran*, 109 F.3d 660 (10th Cir.1997), the Tenth Circuit acknowledged that § 1343 supports two theories of liability: (1) a scheme or artifice to defraud; or (2) a scheme to obtain money by false pretenses, representations, or promises. *Id.* at 664. The court found that "materiality is not an independent element of a wire fraud prosecution," but held nonetheless that "there is a materiality aspect to the determination whether the acts of an accused give rise to a scheme to defraud." *Cochran*, 109 F.3d at 667 n. 3. We agree with the Tenth Circuit that materiality is not an independent element under § 1343. We find unpersuasive, however, the reasons supporting the Tenth Circuit's conclusion that materiality is an aspect of a scheme to defraud.

[5] See *United States v. Falcone*, 934 F.2d 1528, 1545 (11th Cir.), *vacated*, 939 F.2d 1455 (11th Cir.1991), *modified in part and reinstated in part*, 960 F.2d 988 (11th Cir.1992) (en banc); *United States v. Swearingen*, 858 F.2d 1555, 1556 (11th Cir.1988).

because materiality was not in issue. Although decided after *Wells*, *Goldsmith* does not re-examine the issue of materiality in light of *Wells*. Instead, *Goldsmith* follows this court's pre-Wells decisions which also have not been re-examined in light of Wells.

In addition, in its discussion of the relevant issues, the *Goldsmith* panel acknowledged that § 1344 has two parts, namely § 1344(a)(1) and (a)(2),[6] and that if an indictment charged a defendant under both parts, the trial court could submit the case to the jury so long as the evidence at trial was sufficient to convict under either part. 109 F.3d at 716. The Goldsmith panel listed the elements under subsections (a)(1) and (a)(2) but ultimately affirmed the defendant's conviction under § 1344(a)(1), the subsection under which it did not list materiality as an element.[7] Thus, the *Goldsmith* panel's listing materiality as an element under § 1344(a)(2) was not necessary to the panel's holding and was, consequently, dicta. As a result, we are not bound by *Goldsmith* on whether materiality is an element under § 1344, and we follow *Wells* in addressing this question.[8]

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[6] In 1989, § 1344 was amended such that the former subsection (a) became the entire section. Thus, what *Goldsmith* referred to as subsections 1344(a)(1) and (a)(2) are now subsections 1344(1) and (2).

[7] The defendant in *Goldsmith* was indicted under both subsections (a)(1) and (a)(2). Because the evidence supported the defendant's conviction under subsection (a)(1), the court did not reach whether the defendant violated subsection (a)(2). See *Goldsmith*, 109 F.3d at 716 ("Where the indictment and instructions to the jury charge both clauses of the statute, as was done in this case, the defendant's conviction may be sustained under either clause.) (citation omitted).

[8] To the extent any of our pre-*Wells* decisions held that materiality is an element under § 1344, we disavow those holdings based on the Supreme Court's intervening decision in *Wells*.



Applying *Wells* to § 1344, we first observe that the word "material" does not appear in the statute. The version of 18 U.S.C. § 1344 in effect when Neder was indicted states in pertinent part:

> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—
> (1) to defraud a financial institution; or
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1344 (1988). Section 1344 was not enacted during the recodification of the federal criminal code in 1948, but its language, like § 1343, is substantially identical to and was patterned after § 1341. These factors, as we stated regarding §§ 1341 and 1343, persuade us that materiality is not an element under § 1344.

D. Use Of The Term "False Representation"

Before addressing Neder's tax fraud convictions, we do note that § 1014 criminalizes false statements, while §§ 1341, 1343, and 1344 proscribe "false or fraudulent pretenses, representations, or promises," and that on that basis the Ninth Circuit has held, after *Wells*, that materiality is an element under § 1344. See, *United States v. Nash*, 115 F.3d 1431, 1436 (9th Cir.1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1054, ___ L.Ed.2d ___ (1998). We disagree with the Ninth Circuit's analysis that since the term "representation" included "some notion of materiality at common law," this indicates that Congress intended for materiality to be an element of the bank fraud statute. See *id*. This ignores that Congress now has

employed the terms "material representation" and "material misrepresentation" in other statutes.[9] The fact that Congress uses the term "material" in conjunction with "representation" or "misrepresentation" in some statutes but not in others rebuts any presumption that Congress now intends to make materiality an element under a statute whenever it employs the term "representation" in that statute.

We are also unpersuaded by the Ninth Circuit's rationale that § 1344 targets fraud and, therefore, necessarily includes materiality as an element of bank fraud. This approach is inconsistent with Wells, which disfavors inferring a materiality requirement where the statutory language does not expressly include one. See *Wells*, ___ U.S. at ___, 117 S.Ct. at 927; *Nash*, 115 F.3d at 1436.

E. Tax Fraud: 26 U.S.C. § 7206(1)

Finally, we address whether materiality is an element under 26 U.S.C. § 7206(1). The relevant language of § 7206(1) refers to "every material matter," as follows:

> Any person who—
> (1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by written declaration that it is made under the penalties of perjury, and

[9] All of the following statutes use either the term "material representation" or "material misrepresentation": 8 U.S.C. § 1324c(f); 11 U.S.C. § 505(b); 12 U.S.C. § 1715r; 15 U.S.C. § 78u- 4(g)(10)(A)(i)(I); 15 U.S.C. § 158; 15 U.S.C. § 1647(b)(1); 25 U.S.C. § 88; 25 U.S.C. § 1494; 38 U.S.C. § 3721; 39 U.S.C. § 3005(d); 42 U.S.C. § 5919(f); 42 U.S.C. § 6881(d); 42 U.S.C. § 8817(f); 42 U.S.C. § 8835(g); 45 U.S.C. § 664(b); 45 U.S.C. § 720(d); 45 U.S.C. § 746(a); 45 U.S.C. § 832(b); 48 U.S.C. § 1574b(d).



> which he does not believe to be true and correct as to every *material* matter ... shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ... or imprisoned not more than 3 years, or both....

26 U.S.C. § 7206(1) (emphasis supplied). The government does not dispute that materiality is an element under § 7206(1) but contends that the materiality question is purely a question of law and appropriately was decided by the court.

Based on *Gaudin*, a majority of circuits addressing the question have held that the question of materiality under § 7206(1) is for the jury, not the judge. See *United States v. Uchimura*, 125 F.3d 1282, 1286 (9th Cir.1997); *United States v. McGuire*, 99 F.3d 671, 672 (5th Cir.1996) (en banc), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2407, 138 L.Ed.2d 174 (1997); *United States v. DiRico*, 78 F.3d 732, 736 (1st Cir.1996); *United States v. DiDomenico*, 78 F.3d 294, 303 (7th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 507, 136 L.Ed.2d 398 (1996). But see *United States v. Klausner*, 80 F.3d 55, 60-61 (2d Cir.1996). We now join the First, Fifth, Seventh, and Ninth Circuits in holding that the question of materiality under § 7206(1) is for the jury. The district court thus erred in not submitting the element of materiality to the jury regarding Neder's § 7206(1) offenses.

F. The District Court's Gaudin Error Was Harmless

In this circuit, Gaudin errors do not require automatic reversal but are subject to harmless error analysis. *United States v. Fern*, 117 F.3d 1298, 1307 (11th Cir.1997).[10] Thus, the

[10] Accord *Bilzerian v. United States*, 127 F.3d 237, 242 (2d Cir.1997); *United States v. Knapp*, 120 F.3d 928, 932 (9th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 417, 139 L.Ed.2d 319 (1997); *Waldemer v. United*

government must show that Neder was not prejudiced by the district court's *Gaudin* error. *Id.* (citing *United States v. Olano*, 507 U.S. 725, 734-35, 113 S.Ct. 1770, 1775-76, 123 L.Ed.2d 508 (1993)). The government has met that burden by showing that materiality was not in dispute regarding Neder's tax fraud offense.

Under § 7206(1), a "material matter" is any information necessary to a determination of a taxpayer's income tax liability. See *Uchimura*, 125 F.3d at 1285; *United States v. Aramony*, 88 F.3d 1369, 1384 (4th Cir.1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1842, 137 L.Ed.2d 1046 (1997); *Klausner*, 80 F.3d at 60; see also *United States v. Gaines*, 690 F.2d 849, 858 & n. 16 (11th Cir.1982) (stating that in a prosecution under § 7206(1), "the amounts of the misstatements were legally irrelevant...."); *United States v. Holland*, 880 F.2d 1091, 1096 (9th Cir.1989) (stating that "any failure to report income is material."). Neder's § 7206(1) convictions were based on his failing to report $1,372,360 in income in 1985 and $4,355,766 in income in 1986. An accurate reflection of income is critical to determining a taxpayer's income tax liability. Indeed, Neder did not contest the materiality of his failing to report this income either through testimony or evidence presented during the trial, or during closing argument. Neder did not even contest that he failed to report the money. Neder's defense on the § 7206(1) offenses related solely to his intent--specifically,

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*States*, 106 F.3d 729, 732 (7th Cir.1996); *United States v. Raether*, 82 F.3d 192, 194 (8th Cir.1996). But see *United States v. DeFries*, 129 F.3d 1293, 1311-12 & n. 13 (D.C.Cir.1997) (*Gaudin* error was, per se, a reversible error); *United States v. David*, 83 F.3d 638, 647 (4th Cir.1996) (*Gaudin* error requires automatic reversal); *United States v. DiRico*, 78 F.3d 732, 737-38 (1st Cir.1996) (*Gaudin* error constitutes a "structural error" requiring automatic reversal); *United States v. Pettigrew*, 77 F.3d 1500, 1511 (5th Cir.1996) (harmless error analysis does not apply to *Gaudin* error).



that he had relied on the advice of his attorney and accountant that he was not required to report the money as income.

Because materiality was not in dispute with respect to Neder's tax fraud offense, the district court's *Gaudin* error "did not contribute to the verdict obtained." *Yates v. Evatt*, 500 U.S. 391, 403, 111 S.Ct. 1884, 1892, 114 L.Ed.2d 432 (1991) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)). Therefore, the district court's error was harmless.

## III. CONCLUSION

The district court committed no reversible errors, and Neder's convictions are thus

AFFIRMED.

# United States District Court

Southern District of Florida

UNITED STATES OF AMERICA
v.
ELLIS E. NEDER, JR.

(Name of Defendant)

**JUDGMENT IN A CRIMINAL CASE**
**(For Offenses Committed on or After November 1, 1987)**
Case Number:
91-175-Cr-J-16
Thomas G. Fallis, Esq.
(Defendant's Attorney)

THE DEFENDANT:

☐ pleaded guilty to count(s)
■ was found guilty on count(s) 1, 2-12, 21-23, 26-28, 30, 31-33, 34, 35, 36-72, 77, 78-84, 86, 87, 89, 90 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 8 U.S.C. 371 | Conspiracy to defraud a financial institution. | May 1988 | 1 |
| 8 U.S.C. 1344 | Bank fraud. | April 1986 | 2-12, 77 |
| 8 U.S.C. 1341 | Mail fraud. | April 1986<br>Sept. 1987 | 21-23, 26-28, 30, 34, 35 |
| 8 U.S.C. 1343 | Wire fraud. | Nov. 1986 | 31, 33, 78-84 |
| 8 U.S.C. 1014 | False statements to financial institutions. | October 1985 | 36-72 |
| 8 U.S.C. 7206(1) | Filing false income tax returns. | Dec. 1987 | 86, 87 |



| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 8 U.S.C. 1962(c) and 1962(d) | RICO. | May 1988 | 89, 90 |

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

■ The defendant has been found not guilty on count(s) 13 through 20, and is discharged as to such count(s).

☐ Count(s) _____ (is) (are) dismissed on the motion of the United States.

■ It is ordered that the defendant shall pay a special assessment of $3,650.00, for count(s) 1, 2-12, 21-23, 26-28, 30, 31-33, 34, 35, 36-72, 77, 78-84, 86, 87,89, 90, which shall be due ■ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 262-75-4595

Defendant's Date of Birth: September 15, 1942

Defendant's Mailing Address:
c/o U.S. Marshal

Defendant's Residence Address:
c/o U.S. Marshal

June 2, 1994
Date of Imposition of Sentence

/s/
Signature of Judicial Officer

HARVEY E. SCHLESINGER,
U.S. District Judge
Name & Title of Judicial Officer

September 15,1992
Date

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIVE (5) YEARS on each of Counts 1, 77, 80, 81, 82, 83 and 84, each count to run concurrently with each other.

IT IS FURTHER ADJUDGED that the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THREE (3) YEARS on each of Counts 86 and 87, each count to run concurrently with each other and with the sentence imposed on Counts 1, 77, 80, 81, 82, 83 and 84.

IT IS FURTHER ADJUDGED that the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of SEVEN (7) YEARS on each of Counts 89 and 90, each count to run concurrently with each other and with the sentences imposed on Counts 1, 77, 80, 81, 82, 83, 84, 86 and 87.

IT IS FURTHER ADJUDGED that the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FIVE (5) YEARS on each of Counts 2 through 12, 21 through 23, 26 through 28, 30 through 72, 78 and 79, each count to run concurrently with each other and consecutive to the sentences imposed on Counts 1, 77, 80, 81, 82,83, 84, 86 and 87, for a TOTAL TERM OF IMPRISONMENT OF TWELVE (12) YEARS AND THREE (3) MONTHS.

■ The court makes the following recommendations to the Bureau of Prisons: Federal Institution, Jesup, Georgia.

■ The defendant is remanded to the custody of the United States marshal.

☐ The defendant shall surrender to the United States marshal for the district,

a.m.

☐ at _____ p.m. on

☐ as notified by the United States marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

☐ before 2 p.m. on

☐ as notified by the United States marshal.

☐ as notified by the probation office.



## RETURN

I have executed this judgment as follows:

Defendant delivered on 10/13/92 to FCI - SEA GOUILLE at , with a certified copy of this judgment.

United States Marshal

By

Deputy Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE YEARS on each of Counts 1, 77, 80 through 84, 86, 87, 89 and 90.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

- ■ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
- □ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- ■ Defendant shall participate in the Home Detention program for a period of ___ days. During this time, defendant will remain at defendant's place of residence except for employment and other activities approved in advance by defendant's Probation Officer. Defendant will be subject to the standard conditions of Home Detention adopted for use in the Middle District of Florida, which may include the requirement to wear an electronic monitoring device and to follow electronic monitoring procedures specified by the Probation Officer.

Defendant shall pay the unpaid balance of restitution (see page 4 of this Judgment ) upon release from imprisonment.

Defendant is prohibited from incurring new credit charges, opening new lines of credit, or obligating for major purchases without approval of the probation office unless in compliance with payment schedule.

Defendant shall provide probation office iwth requested financial information.

Defendant is prohibited from engaging in employment related to real estate development.



## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in resident or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

**RESTITUTION AND FORFEITURE**

■ The defendant shall make restitution to the following persons in the following amounts:

| Name of Payee | Amount of Restitution |
|---|---|
| Carteret S & L | $402,577.00 |
| Amerifirst Federal S & L (now Resolution Trust Corp. (RTC)) | $2,300,000.00 |
| Greyound Leasing & Financial Corp. | $1,300,000.00 |
| Baltimore Federal Saving (now RTC) | $1,778,419.00 |
| Security First Federal S & L (now RTC) | $3,100,000.00 |
| United Brotherhoiod of Carpenters & Joiners of America | $10,265,00.00 |
| Cari Bank | $5,900,000.00 |

TOTAL RESTITUTION: $25,045,996.00

Payments of restitution are to be made to:

■ the United States Attorney for transfer to the payee(s).

☐ the payee(s).

Restitution shall be paid:

■ in full immediately.

☐ in full not later than _____.

☐ in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

☐ in installments according to the following schedule of payments:



Any payment shall be divided proportionately among the payees named unless otherwise specified here.

**FORFEITURE**

☐ The defendant is ordered to forfeit the following property to the United States:

**STATEMENT OF REASONS**

■ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level:
Criminal History Category:
Imprisonment Range: __ to __ months
Supervised Release Range: __ to __ years
Fine Range: $ to $

■ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $25,045,996.00

☐ Full restitution is not ordered of rthe following reason(s):*

■ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):*

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):*



## Excerpts of Jury Instructions

In summary, Count One charges that the Defendants knowingly and willfully conspired together in violation of Title 18, United States Code, Section 371, to execute and attempt to execute a scheme and artifice to defraud and to obtain the moneys owned by and under the custody and control of federally insured financial institutions, by means of false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1344; and to knowingly make any false statement or report, or willfully overvalue any land, property or security for the purpose of influencing in any way the action of the institutions the accounts of which are insured by the FSLIC upon applications and loans, or any change or extension of any of the same, in violation of Title 18, United States Code, Section 1014; and to knowingly and willfully transmit by means of wire communications in interstate commerce writings, signals, pictures, and sounds for the purpose of executing a scheme and artifice to defraud, and to obtain moneys by false pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1343.

Count Ninety charges that the Defendants unlawfully and willfully entered into a separate conspiracy in violation of Title 18, United States Code, Section 1962(d), to conduct and participate, directly or indirectly, in the conduct of the affairs of an enterprise through a pattern of racketeering activity consisting of mail fraud and wire fraud, in violation of Title 18, United States Code, Section 1962(c).

The remaining Counts charge the commission of the substantive offenses; namely that the Defendants committed bank fraud in Counts Two through Twelve, and Seventy-seven, in violation of Title 18, United States Code, Section 1344; land over-evaluations in Counts Thirteen through Twenty, and false

statements to financial institutions in Counts Thirty-six through Seventy-two, all in violation of Title 18, United States Code, Section 1014; mail fraud in Counts Twenty-one through Twenty-three, Twenty-six through Twenty-eight, Thirty, Thirty-four, and Thirty-five, all in violation of Title 18, United States Code, Section 1341; wire fraud in Counts Thirty-one through Thirty three, and Seventy-eight through Eighty-four, all in violation of Title 18, United States Code, Section 1343; false statements on income tax returns in Counts Eighty-six and Eighty-seven, all in violation of Title 26, United States Code, Section 7206(1); and racketeering in Count Eighty-nine, in violation of Title 18, United States Code, Section 1962(c).

You will note that as to Counts One and Ninety, the Defendants are not charged in those counts with violating the substantive counts I have named; rather they are charged with having conspired to do so in violation of Title 18, United States Code, Sections 371 and 1962(d).

I will explain the law governing those substantive offenses in a moment.

Title 18, United States Code, Section 371, makes it a separate federal crime or offense for anyone to conspire or agree with someone else to do something which, if actually carried out, would amount to another Federal crime or offense. So, under this law, a "conspiracy" is an agreement or a kind of "partnership" in criminal purposes in which each member becomes the agent or partner of every other member.

In order to establish a conspiracy offense in Count One, it is not necessary for the Government to prove that all of the people named in the indictment were members of the scheme; or that those who were members had entered into any formal type of agreement; or that the members had planned together all of the details of the scheme or the "overt acts that the



indictment charges would be carried out in an effort to commit the intended crime.

Also, because the essence of a conspiracy offense is the making of the agreement itself (followed by the commission of any overt act), it is not necessary for the Government to prove that the conspirators actually succeeded in accomplishing their unlawful plan.

A Defendant can be found guilty of that offense as charged in Count One only if all of the following elements are proved beyond a reasonable doubt:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment;

Second: That the Defendant willfully became a member of such conspiracy;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the methods (or "overt acts") described in the indictment; and

Fourth: That such "overt act" was knowingly committed at or about the time alleged in an effort to carry out or accomplish some object of the conspiracy.

An "overt act" is any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy.

A person may become a member of a conspiracy without knowing all of the details of the unlawful scheme, and without knowing who all of the other members are. So, if a Defendant

has an understanding of the unlawful nature of a plan and knowingly and willfully joins in that plan on one occasion, that is sufficient to convict him for conspiracy even though he did not participate before, and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of one, does not thereby become a conspirator.

In this instance, with regard to the alleged conspiracy in Count One, the Indictment charges that the Defendants conspired with each other and other persons to commit bank fraud or wire fraud, or to make false statements to federally insured financial institutions. It is charged, in other words, that they conspired to commit three separate, substantive crimes or offenses.

In such a case it is not necessary for the Government to prove that the Defendant under consideration willfully conspired to commit all of the substantive offenses. It would be sufficient if the Government proves, beyond a reasonable doubt, that the Defendants willfully conspired with someone to commit one of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which of the three offenses the Defendants conspired to commit. If you cannot agree in that manner, you must find the Defendant not guilty.

Title 18, United States Code, Section 1344, makes it a federal crime or offense for anyone to execute or attempt to execute a scheme to obtain money of a federally insured financial institution.



A Defendant can be found guilty of that offense as charged in Counts Two through Twelve, and Seventy-seven only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully devised a scheme for obtaining, by means of false or fraudulent pretenses, representations or promises, moneys or funds owned by or under the custody or control of a federally insured financial institution;

Second: That the Defendant participated directly in, or aided and abetted, the making of false pretenses, representations, or promises which were material to the federally insured institution; and

Third: That the Defendant executed, or aided and abetted the execution of the scheme by preparing and submitting and causing to be prepared and submitted to the insured financial institution certain documents.

A federal insured financial institution means any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, or any savings and loan associations, whose deposits are insured by the Federal Savings and Loan Insurance Corporation.

The word "scheme" includes any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations or promises, money or property from persons so deceived.

A statement or representation is "false" or "fraudulent" if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity, and is made or caused to be made with intent to defraud. A statement

or representation may also be "false" or "fraudulent" when it constitutes a half truth with intent to defraud, or effectively conceals a material fact with intent to defraud. A "material fact" is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in an particular transaction.

If you find that the Government has proved these three elements stated above beyond a reasonable doubt, you need not consider whether the false and fraudulent pretense, representation, or promise was a material false and fraudulent pretense, representation or promise, even though that language is used in the Indictment. This is not a question for the jury to decide.

To act with "intent to defraud" means to act knowingly and with the specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

Good faith is a complete defense to those charges that require intent to defraud in the indictment since good faith on the part of the Defendant is inconsistent with intent to defraud or willfulness which is an essential part of the charges. The burden of proof is not on the Defendant to prove his good faith, of course, since he has no burden to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted with specific intent to defraud where it is charged in the indictment.

One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent even though his opinion is erroneous or his belief is mistaken; and similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent.



On the other hand, an honest belief on the part of the Defendant that a particular business venture was sound and would ultimately succeed would not, in and of itself, constitute "good faith" as used in these instructions if, in carrying out that venture, the Defendant knowingly made false or fraudulent representations to others with the specific intent to deceive them.

It is not necessary that the Government prove all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme; or that the alleged scheme actually succeeded in defrauding anyone.

What must be proved beyond a reasonable doubt is that the Defendant knowingly and willfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the Indictment; and that the act in execution of a scheme was performed as charged.

Each separate act of execution in furtherance of a scheme to defraud constitutes a separate offense.

Title 18, United States Code, Section 1014, makes it a federal crime or offense for anyone to willfully overvalue any land to a federally insured bank or savings and loan association.

A Defendant can be found guilty of that offense charged in Counts Thirteen through Twenty only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly overvalued any land, and such overvaluation was a material fact to an insured savings and loan association or insured bank, as charged; and

Second: That the Defendant overvalued the land willfully and with intent to influence the action of the savings and loan association or insured bank

upon an application, advance, commitment or loan, or any change or extension thereof.

An "insured bank" means any bank the deposits of which are insured by the Federal Deposit Insurance Corporation. An "insured savings and loan association" means any such institution whose deposits are insured by the Federal Savings and Loan Insurance Association.

The terms "false" and "material" have already been defined for you.

It is not necessary, however, to prove that the institution involved was, in fact, influenced or misled. The gist of the offense is an attempt to influence such an institution willfully overvaluing land.

If you find that the Government has proved these two elements stated above beyond a reasonable doubt, you need not consider whether the false and fraudulent pretense, representation, or promise was a material false and fraudulent pretense, representation or promise, even though that language is used in the indictment. This is not a question for the jury to decide.

Title 18, United States Code, Section 1014, makes it a federal crime or offense for anyone to willfully make a false statement to a federally insured bank or savings and loan association.

A Defendant can be found guilty of that offense charged in Counts Thirty-Six through Seventy-two only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly made a false statement or report concerning a material fact to an insured savings and loan association or insured bank, as charged; and



Second: That the Defendant made the false statement or report willfully and with intent to influence the action of the savings and loan association or insured bank upon an application, advance, commitment or loan, or any change or extension thereof.

The terms "insured bank," "false," and "material" have already been defined for you.

Again, it is not necessary to prove that the institution involved was, in fact, influenced or misled. The gist of the offense is an attempt to influence such an institution by willfully making a false statement or report concerning the matter.

If you find that the Government has proved these two elements stated above beyond a reasonable doubt, you need not consider whether the false and fraudulent pretense, representation, or promise was a material false and fraudulent pretense, representation or promise, even though that language is used in the indictment. This is not a question for the jury to decide.

Title 18, United States Code, Section 1341, makes it a federal crime or offense for anyone to use the United States mails in carrying out a scheme to defraud.

A Defendant can be found guilty of that offense charged in Counts Twenty-one through Twenty-three, Twenty-six through Twenty-eight, Thirty, Thirty-four and Thirty-five only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully devised a scheme to defraud, or for obtaining money or property by means of false pretenses, representations or promises; and

Second: That the Defendant used the United States Postal Service by mailing, or by causing to be mailed, or takes or receives therefrom, some matter or thing for the purpose of executing the scheme to defraud.

The terms "scheme," "false," "material," and "intent to defraud" have already been defined for you.

It is not necessary that the Government prove all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme; or that the material mailed was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of the mail was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the Defendant knowingly and willfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the Indictment; and that the use of the U.S. mail was closely related to the scheme because the Defendants either mailed something, or caused it to be mailed, or took or received a matter or thing in an attempt to execute or carry out the scheme. To "cause" the mails to be used is to do an act with knowledge that the use of the mails will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the mails in furtherance of a scheme to defraud constitutes a separate offense.

Title 18, United States Code, Section 1343, makes it a federal crime or offense for anyone to use interstate wire communications facilities in carrying out a scheme to defraud.

A Defendant can be found guilty of that offense charged in Counts Thirty-one through Thirty-three and Seventy-eight



through Eighty-four only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant knowingly and willfully devised a scheme to defraud, or for obtaining money or property by means of false pretenses, representations or promises; and

Second: That the Defendant knowingly transmitted or caused to be transmitted by wire in interstate commerce some sound for the purpose of executing the scheme to defraud.

The words "scheme," "false," and "intent to defraud" have been previously defined for you.

It is not necessary that the Government prove all of the details alleged in the Indictment concerning the precise nature and purpose of the scheme; or that the material transmitted by wire was itself false or fraudulent; or that the alleged scheme actually succeeded in defrauding anyone; or that the use of the interstate wire communication facilities was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the Defendant knowingly and willfully devised or intended to devise a scheme to defraud substantially the same as the one alleged in the Indictment; and that the use of the interstate wire communications facilities was closely related to the scheme because the Defendant either wired something, or caused it to be wired in interstate commerce in an attempt to execute or carry out the scheme. To "cause" interstate wire communication facilities to be used to do an act with knowledge that the use of the wires will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the interstate wire communications facilities in furtherance of a scheme to defraud constitutes a separate offense.

Title 26, United States Code, Section 7206(1), makes it a crime for anyone willfully to make a false statement on an income tax return. "Willfully" means with intent to violate a known legal duty.

The Defendant Neder can be found guilty of that offense as charged in Counts Eighty-six and Eighty-seven, only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant signed an income tax return that contained a written declaration that it was made under penalties of perjury:

Second: That in this return the Defendant falsely reported a total income in his 1985 return of $53,625 and in his 1986 return a minus $980,377;

Third: That the Defendant knew the statement was false; and

Fourth: That the Defendant made the statement on purpose, and not as a result of accident, negligence or inadvertence.

If you find that the Government has proved these things, you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide.

Count Eighty-nine of the Indictment charges that from in or about May 1984 to in or about May 1988, the Defendants were persons associated with an "enterprise" engaged in, or the activities of which affected, interstate commerce, and that they knowingly and willfully participated in the conduct of the enterprise's affairs "through a pattern of racketeering activity,"



in violation of Title 18, United States Code, Section 1961 and 1962(c).

The term "enterprise" includes any "partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Individuals and corporations are a "group of individuals associated in fact."

The term "racketeering activity" includes any act in violation of Title 18 of the Untied [*sic*] States Code relating to mail fraud (Section 1341) and wire fraud (Section 1343).

The term "pattern of racketeering activity" requires at least two acts of "racketeering activity," sometimes called "predicate offenses," which must have been committed within ten years of each other, one of which must have occurred after October 15, 1970.

A Defendant can be guilty of that offense as charged in Count Eighty-nine only if all of the following elements are proved beyond a reasonable doubt:

First: That the Defendant was associated with an "enterprise" as defined in these instructions;

Second: That the Defendant knowingly and willfully committed, or knowingly and willfully aided and abetted the commission of at least two of the predicate offenses hereinafter specified;

Third: That the two predicate offenses alleged committed by the Defendant were connected with each other by some common scheme, plan or motive so as to be a pattern or a criminal activity and not merely a series of separate, isolated or disconnected acts;

Fourth: That through the commission of the two or more connected offenses, the Defendant conducted or participated in the conduct of the "enterprises's" affairs; and

Fifth: That the "enterprise" was engaged in, or that its activities affected, interstate commerce.

With respect to the Second specific element defined above, the Government must prove beyond a reasonable doubt that the Defendant under consideration knowingly and willfully committed, or aided and abetted the commission of, any two of the predicate offenses specifically alleged and described in the Indictment as Counts Twenty-one through Twenty-three, Thirty-one, Twenty-six through Twenty-eight, Thirty, Thirty-two through Thirty-five and Seventy-eight through Eighty-Four, and alleged as racketeering acts 1 through 3, 4(b), 6 though [*sic*] 8, and 10 through 15(g). You are further instructed, however, that you must unanimously agree concerning each Defendant under consideration as to which of the two predicate offenses he is alleged to have committed, or aided and abetted in committing. It would not be sufficient if some of the jurors should find that a Defendant committed two of the predicate offenses while the remaining jurors found that he committed two different offenses; you must all agree upon the same two predicate offenses in order to find a Defendant guilty of Count Eighty-nine.

With respect to the Fifth specific element defined above—the requirement that the "enterprise" was engaged in, or that its activities affected, interstate commerce—the Government contends that in conducting the affairs of the enterprise the Defendants would: obtain loan proceeds from lenders by interstate and intrastate wire transmissions; mail documents out of the State of Florida for signature and cause them to be returned to the State of Florida as part of various loan and real estate transactions; send correspondence and



documents from Jacksonville in the State of Florida to locations outside the State of Florida in support of their attempts to obtain land acquisition and land development loans. The Government contends that documents in support of various loan requests were sent from the State of Florida to the States of Arizona, New York, and to Washington, D.C., causing the transmission of funds by wire in interstate commerce. You are instructed that if you find beyond a reasonable doubt that these transactions or events occurred, and that they occurred in, or as a direct result of, the conduct of the affairs of the alleged enterprise, the required effect upon interstate commerce has been established. If you do not so find, the required effect upon interstate commerce has not been accomplished.

Title 18, United States Code, Section 1962(c), makes it a federal crime or offense for anyone who is associated with an "enterprise" engaged in, or activities of which affect, interstate commerce, to participate in conducting the affairs of the enterprise through a "pattern of racketeering activity."

The meaning of those terms, and an explanation of what must be proved in order to establish that offense, is discussed in that part of these instructions covering Count Eighty-nine of the Indictment.

However, the Defendants named in Count Ninety of the Indictment—the conspiracy count—are not charged in that count with violating Section 1962(c); rather, they are charged with knowingly and willfully conspiring to violate that law, the alleged conspiracy itself being a separate crime or offense in violation of Section 1962(d).

So, under that law a "conspiracy" is a combination or agreement of two or more persons to join together to attempt to accomplish an offense which would be in violation of Section 1962(c) as elsewhere defined in these instructions. It is a kind

of "partnership in criminal purposes" in which each member becomes the agent of every other member.

The evidence in the case need not show that the alleged members of the conspiracy, in Count Ninety, entered into any express or formal agreement; or that they directly discussed between themselves the details of the scheme and its purpose, or the precise ways in which the purpose was to be accomplished. Neither must it be proved that all of the persons charged to have been members of the conspiracy were such, nor that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

A Defendant can be found guilty of that offense as charged in Count Ninety only if all of the following elements are proved beyond a reasonable doubt:

First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, namely, to engage in a "pattern of racketeering activity" as charged in the indictment; and

Second: That the Defendant knowingly and willfully became a member of such conspiracy; and

Third: That at the time the Defendant knowingly and willfully agreed to join in such conspiracy, he did so with the specific intent either to personally participate in the commission of two "predicate offenses," as elsewhere defined in these instructions, or that he specifically intended to otherwise participate in the affairs of the "enterprise" with the knowledge and intent that other members of the conspiracy would commit two or more "predicate offenses" as a part of a "pattern of racketeering activity."



A person may become a member of this conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a Defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joining that plan on one occasion, that is sufficient to convict him for conspiracy even though he did not participate before, and even though he played only a minor part.

Of course, mere presence at the scene of a transaction or event, or the mere fact that certain persons may have associated with each other, and have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

The guilt of a Defendant in a criminal case may be proved without evidence that he personally did every act involved in the commission of the crime charged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished through direction of another person as an agent, or by acting together with, or under the direction of, another person or persons in a joint effort.

So, if the acts or conduct of an agent, employee or other associate of the Defendant are willfully directed or authorized by the Defendant, or if the Defendant aids and abets another person by willfully joining together with that person in the commission of a crime, then the law holds the Defendant responsible for the conduct of that other person just as though the Defendant had engaged in such conduct himself.

Notice, however, that before any Defendant can be held criminally responsible for the conduct of others it is necessary that the Defendant willfully associate himself in some way with

the crime, and willfully participate in it. Mere presence at the scene of a crime and even knowledge that a crime is being committed are not sufficient to establish that a Defendant either directed or aided and abetted the crime. You must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

One of the Defendants is a corporation. A corporation is a legal entity, and it may be found guilty of a criminal offense.

A corporation, of course, cannot act for itself. It may only act through its agents. Agents are the officers, directors, employees, or other persons who may be authorized to act for the corporation. A corporation is legally responsible for those acts or omissions of its agents made or performed within the scope of their employment.

To find a corporate defendant guilty, you must find beyond a reasonable doubt that all the essential elements of the offense, as set forth in these instructions, are present as to the corporation in the form of acts or omissions of its agent which were performed with the scope of their employment. Whether the agents' acts or omissions were committed within the scope of their employment is a question of fact.

To be acting within his employment, the agent first must have intended that his act would produce some benefit to the corporation. Second, the agent must have been acting within his authority. An act was within the agent's authority if it was directly related to the performance of the type of duties that the employee had the general authority to perform or if outsiders could reasonably assume that the agent had the authority to perform the act, judging from his position with the company, the responsibility previously entrusted to him, and the circumstances surrounding his past conduct.



If the agent was acting within the scope of his employment, the fact that the agent's act was illegal, contrary to his employer's instructions, or against the corporation's policies will not relieve the corporation of responsibility for it.

If you find that an act of an agent was not committed within the scope of his employment, then you must consider whether the corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, with the authority to perform or authorize the act, and with the intent to benefit the corporation, either expressly approves or engages in conduct that is consistent with approving the act.

A corporation is legally responsible for any act or omission approved by its agents.

In these charges, the Court has reviewed the pertinent parts of federal statutes which are alleged to have been violated. Where a statute specifies several alternative ways in which an offense may be committed, the Indictment may allege the several ways in the conjunctive, that is, by using the word "and;" therefore, if only one of the alternatives is proved beyond a reasonable doubt, that is sufficient for conviction, so long as the jury agrees unanimously as to at least one of the alternatives.

You will note that the Indictment charges that the offenses were committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offenses. It is sufficient if the Government proves beyond a reasonable doubt that the offenses were committed on a date reasonably near the date alleged.

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

The word "willfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law.



**18 U.S.C. § 1341**

18 U.S.C. § 1341, as currently in effect, provides as follows:

**"§ 1341. Frauds and swindles.**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

## 18 U.S.C. § 1343

18 U.S.C. § 1343, as currently in effect, provides as follows:

**"§ 1343. Fraud by wire, radio, or television.**

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."



## 18 U.S.C. § 1344

18 U.S.C. § 1344, as currently in effect, provides as follows:

**"§ 1344. Bank fraud.**

Whoever knowingly executes, or attempts to execute, a scheme or artifice--

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

## 26 U.S.C. § 7206

26 U.S.C. § 7206, as currently in effect, provides as follows:

"**§ 7206. Fraud and false statements**.

Any person who--

(1) Declaration under penalties of perjury. -- Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance. -- Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries. -- Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud. -- Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or



(5) Compromises and closing agreements. -- In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully--

(A) Concealment of property. -- Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records. -- Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.